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Clark Bigler and Utah Taxpayers Association v. Glen K Vernon : Reply Brief

Utah Supreme Court

BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

CLARK BIGLER and UTAH TAXPAYERS ASSOCIATION, Plaintiffs/Appellants, vs. GLEN K. VERNON, Payson City Administrator and PAYSON CITY CORPORATION, Defendants/Appellees.	Case No. 920003 Priority No. 16

REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH - JUDGE RAY M. HARDING

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I. THE UTAH CONSTITUTION ENSURES THAT THE PEOPLE MAY BRING A REFERENDUM AGAINST A NEW TAX SCHEME ENACTED BY A MUNICIPALITY.

Article VI of the Utah Constitution guarantees the people the right to initiate or refer "any legislation."[1] To facilitate the orderly use of this right, the legislature is authorized to prescribe the ministerial tasks required to get the issue to the ballot, i.e. the forms to use, number of signatures and time deadlines. The legislature does not have the power, claimed by the Appellees (hereinafter collectively referred to as "Payson"), to preempt one type of legislation, be it a new tax scheme or new zoning ordinance, from the people's right of referral without amending the Constitution. Article VI, § 1 of the Utah Constitution states that the people may exercise the initiative and referral right "under such conditions and in such manner and within such time as may be provided by law." Mistakenly, Payson and Amicus Curiae (Salt Lake City Corporation) interpret this "condition precedent" to be an "exemption" that authorizes the legislature to exclude certain types of legislation from the people's referral and initiative rights. Such a reading of article VI strains the rules of grammatical construction, has no basis in law and is contrary to every Utah Supreme Court decision interpreting the referral and initiative right as

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1 Any "statutes that limit [this] power of the people to initiate legislation are to be closely scrutinized and narrowly construed" so as to preserve the people's right to petition the government. Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 1892-1983 (1988).

being available to challenge "any legislation." See, e.g., Shriver v. Bench, 6 Utah 2d 329, 313 P.2d 475 (1957); Wilson v. Manning, 657 P.2d 251 (Utah 1982).

Simply stated, the issue presented in this case is whether or not the enactment of a new tax scheme is a legislative act. If it is a legislative act, it may be referred to the people. The test for determining whether an act is legislative or merely administrative is set forth in Appellants' Brief at 17-22. Being able to say whether "we do or do not want a new utility tax" is a legislative policy decision under that test. Moreover, the answer to that question is a broad, general directive statement that does not require any "specialized training." See Shriver v. Bench, 6 Utah 2d 329, 313 P.2d 475 (1957). Contrary to Payson's contentions (Appellees' Brief at 32-35), Mr. Bigler and the Utah Taxpayers Associations (hereinafter collectively referred to as "Taxpayers") are not asking to interfere with administrative decisions such as "how much the police officers should be paid" or "how much money is needed to pay for snow removal this year."[2]

Payson's argument that the referral right has been taken from the people because only the "corporate authorities"

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2 Payson's allegation (Appellees' Brief at 22-25) that any ordinance dealing with revenue raising or expenditures is exempt from the referenda provision is not well taken. If this were true, almost every law would be excluded, because virtually every law entails raising revenues or spending tax dollars.

are empowered to levy taxes misreads the constitution and the cases of State v. Standford, 24 Utah 148, 66 P. 1061, 1063 (1901) and The Best Foods, Inc. v. Christensen, 75 Utah 392, 285 P. 1001, 1003 (1930). The constitution and these cases declare that the "legislature" cannot enact taxes for the municipality; i.e., "no other person or body other than the county" can enact local taxes. Payson's attempt to read "the county" as only meaning the county commissioners is wrong. The people can decide directly, rather than through elected representatives. If Payson's interpretation were correct, no initiative or referenda of any local matter would ever be allowed because only the county commissioners and city councilmen could act -- not the people. Payson's argument does not give effect to all of the provisions of the constitution and contradicts article VI, § 1 which vests the right to refer legislation in the people.

Moreover, Payson's claim (Appellees' Brief at 40-41) that Utah Code Ann. § 11-26-1 (1981)[3] has already enacted a utility tax for the municipalities, and that the municipalities' only remaining duty is to set the rate and collect the tax, is contrary to their position that only the "city" can enact municipal taxes (Appellees' Brief at 32-35), and results from Payson's misreading of § 11-26-1. That section does not enact a tax, it merely authorizes the

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3 All subsequent citations to the Utah Code are to the most recent codification as amended.

municipality to enact a utility tax by its own legislative ordinance if it so desires.[4] Not all municipalities have chosen to enact a utility tax under this provision and Payson did not choose to enact a utility tax until March 7, 1990, some nine years after it was authorized to do so. When Payson decided to enact this new tax, the people then had the right to refer the decision to the general electorate.

Payson's position (Appellees' Brief at 30-32) that other limitations, besides the administrative-legislative limitation, may be placed on the right of referenda is not correct. In dicta, this Court indicated that other criteria such as the efficient management of municipal affairs should also be considered in determining what provisions are subject to direct legislation.[5] Dewey v. Doxey-Layton Reality Co., 3 Utah 2d 1, 277 P.2d 805 (1954). In initiative cases decided subsequent to Dewey, this Court incorporated the Dewey dicta as part of the "practicality test" in determining whether a

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4 If the statute were given Payson's interpretation, only the legislative and constitutional acts authorizing municipal conduct would be subject to referenda as legislative acts. Accordingly, all municipal conduct would be administrative because the municipality would merely be implementing actions it had previously been authorized to do. Not only is this interpretation absurd, but it gives no effect to the constitutional provisions and statutes providing for the referenda of municipal legislation.

5 Payson's citation of State ex rel. Keefe v. City of St. Petersburg, 145 So. 175 (1933) is not applicable to the case at bar. St. Petersburg only addressed whether various "budget appropriation ordinances" authorizing the expenditure of funds for such things as police salaries are legislative or administrative. This question is completely distinguishable from whether "a law enacting new tax scheme" is administrative or legislative.

matter is administrative or legislative. Shriver v. Bench, 6 Utah 2d 329, 313 P.2d 475 (Utah 1957). As discussed in detail on pages 17-22 of Appellants' Brief, the Payson City Utility Tax (the "Utility Tax") clearly satisfies the elements of the tests used by the Utah Supreme Court to determine that an act is legislative in nature.

In addition, a review of past state initiatives confirms that laws relating to tax schemes are subject to initiatives and referenda. See the Library of the Utah Lieutenant Governor for copies of the following initiatives: 1990-Removal of State and Local Sales Tax from Food, 1988-Tax Spending Limitations, 1988-Tax Reductions, and 1988-Income Tax Credit for Private Education. All of these initiatives were reviewed by the Attorney General's Office and found to qualify for circulation and submission to the people. Op. Utah Att'y Gen. (April 5, 1989) (1990 Initiative seeking Removal of State and Local Sales Tax from Food) and Op. Utah Att'y Gen. (April 16, 1987) (1988 Initiative seeking Tax Spending Limitations, Tax Reductions and Income Tax Credit for Private Education). If these initiatives were not legislative acts, they could not have been placed on the ballot. Payson attempts to discredit the impact of these state initiatives, claiming articles VI, § 1; XI, § 5(a) and XIII, § 5 alter the initiative rights for cities to the extent that cities are authorized to restrict the types of legislation that are subject to initiative while the state is not. These provisions do not support such a

position for the following reasons: (1) the pertinent initiative and referral language of article VI, § 1 is identical for cities and the state, (2) article XI, § 5(a) does not give cities any unique referral right it merely allows cities to levy taxes -- a power the state also has, and (3) article XIII, § 5 also does not give the cities a unique referral right but merely prohibits the legislature from imposing taxes on the city. None of these provisions authorize the city to preclude certain legislation from initiative or referral. To the extent Utah Code Ann. § 20-11-21(2) attempts to preclude certain legislation from initiative and referral on the city level it violates article VI, § 1.

II. TAXPAYERS HAVE A FEDERAL RIGHT TO REFER THE UTILITY TAX.

The United States Supreme Court has ruled, and Payson concedes, that when a state constitution grants its people the right to initiate or refer legislative acts it creates a federal right to petition the government that is protected under the United States Constitution. (Appellees' Brief at 44.) As set forth in Appellants' Brief at 17-25, Utah has granted its people the right to initiate or refer the Utility Tax. Accordingly, Taxpayers have a federally protected right to petition government for the repeal of the Utility Tax by way of initiative or referendum, and any improper restriction of the use of this right is actionable under 42 U.S.C. § 1983 (1986).

Payson does not rebut Taxpayers' federal claim that its First Amendment Right to petition government for redress of grievances through the initiative and referendum process was abridged when Payson refused to issue certified petition copies. Payson only attempts to rebut Taxpayers' federal claims by claiming that Taxpayers' right to free speech has not been abridged because other avenues of free speech were still available. This position is not well taken and has been expressly overruled by the United States Supreme Court:

> That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulars outside the bounds of First Amendment Protection. Colorado's prohibition of paid petition circulators restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication. That it leaves open "more burdensome" avenues of communication does not relieve its burden on First Amendment expression.

Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 1893 (1988).

By refusing to issue certified petition copies to the Taxpayers, Payson precluded Taxpayers from being able to engage in one of the most effective forms of political discourse on this issue -- the circulation of certified petition copies. Even if Taxpayers could have made their own "home-made" petition copies, the effectiveness of their ability to engage in political discourse with such petitions would have been diminished by the lack of authenticity of the petitions and the declaration from Payson that it would not

recognize the referendum because it believed a referendum dealing with a "tax levy" was improper.[6]

III. TAXPAYERS ARE ENTITLED TO A DECLARATORY JUDGMENT THAT THEY MAY BRING A REFERENDUM OR REPEAL INITIATIVE AGAINST A NEW MUNICIPAL TAX SCHEME, SINCE THEIR ACTION IS NOT TIME BARRED.

Significantly, Payson premises its entire first argument, (Appellees' Brief at 9-21), on the conjecture that this action is barred by the 30 day limitation period for filing referendum petitions. See Utah Code Ann. § 20-11-24(1). This argument is wrong and fails to recognize that the 30 day time limitation for filing referendum petitions has nothing to do with this case. The gravamen of this case is Payson's refusal to recognize the Taxpayers' application and issue certified petition copies for circulation -- not the filing of a completely signed petition.

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6 Payson claims that Meyer v. Grant is not applicable because it deals with a prior restraint. Prior restraint is not the controlling issue in Meyer, the controlling issue is whether the conduct of the city or state "impedes the sponsors' opportunity to disseminate their views" through the use of petition copies. In Meyer, the Supreme Court found that a law limiting who could circulate petition copies impeded the dissemination of the sponsors' views and was thus unconstitutional. 486 U.S. 414, 108 S.Ct. 1886 (1988). This being the case, clearly a Utah law prohibiting the circulation of petition copies on a legislative matter is unconstitutional.

A. Taxpayers' Declaratory Action Is Not Time Barred By Utah Code Ann. § 20-11-24(1).

Although the Taxpayers timely and properly filed an application for referendum petitions pursuant to Utah Code Ann. § 20-11-7, (R. at 1), Payson refused to provide the Taxpayers with certified petition copies as required by Utah Code Ann. §§ 20-11-11; 20-11-21 and 20-11-23(2)(a). Importantly, Utah Code Ann. §§ 20-11-11; 20-11-21 and 20-11-23(2)(a) impose a ministerial duty upon city recorders to "furnish five copies . . . of petition[s] . . . to the sponsors of [an] initiative or referendum." Id. § 20-11-11. More importantly, this Court has acknowledged that in furnishing the petition copies a city recorder, like the secretary of state, "'cannot pass upon the constitutionality of any proposed law.'" Coleman v. Bench, 96 Utah 143, 84 P.2d 412, 413 (Utah 1938) (quoting White v. Welling, 89 Utah 335, 57 P.2d 703, 705 (Utah 1936)); see also, Op. Utah Att'y Gen. (Apr. 16, 1987) (1988 Initiatives seeking Tax spending Limitations, Tax Reductions and Income Tax Credit for Private Education).

In Coleman v. Bench, the plaintiffs brought an action to compel the "City Recorder of Provo City, to solicit bids from printers for the printing of petition copies as required [by the Initiative and Referendum law at that time]." 84 P.2d at 413. The city recorder in that case had refused to solicit printing bids for the second of two proposed ordinances

designed to repeal a bond ordinance. The recorder attempted to "justif[y] his refusal on the ground that [bond] ordinances [once] passed constitute a contract and cannot be repealed without impairing the obligation of contracts; consequently, any vote passing [plaintiffs'] ordinances would be unconstitutional and void." Id. Ruling on that case, this Court held that "[a]n officer whose duty it is to act ministerially cannot be the judge of what may in the end be or be not constitutional . . . ." Id.

Significantly, the factual situation of the present case is virtually identical to Coleman, unlike the cases cited by Payson. Payson's references to Allan v. Rasmussen, 101 Utah 33, 117 P.2d 287 (1941); and Riverton Citizens for Constitutional Government v. Beckstead, 631 P.2d 885 (Utah 1981), (Appellees' Brief at 10-11), are inapposite because those cases dealt with the filing of petitions and not with the filing of an application. Moreover, in those cases local government did not interfere with the plaintiffs' attempt to comply with the statute. The plaintiffs in those cases merely failed to comply with the statute because of their own conduct. Thus, those cases do not support Payson's contention that the present declaratory action is time barred by Utah Code Ann. § 20-11-24(1).

It is unconscionable to believe city government can frustrate the Taxpayers attempt to comply with the filing requirements of Utah Code Ann. § 20-11-27 by not issuing

petition copies and then assert noncompliance with the statute as a defense. The law is well established that a municipality is estopped from asserting a strict statutory compliance defense when it was the cause of the noncompliance.[7]

Payson's reference to Palmer v. Broadbent, 123 Utah 580, 260 P.2d 581 (1953), (Appellees' Brief at 11-13), which is also distinguishable from the case at bar, supports Taxpayers' position that a municipality cannot interfere with a party's attempt to comply with the referendum statute and then assert that the party did not strictly comply with the statute. In Palmer, the recorder accepted the plaintiffs' application for petition copies, certified the original, but delayed in getting copies of the petition printed. Id. Fearing the delay would make it impossible for plaintiffs to circulate the petition for signatures, the plaintiffs took the law into their own hands and made their own petition copies and certificates which the recorder refused to sign, as required by law, even though she possessed an original certificate which she had made and signed for the plaintiffs. In that case, this Court ruled that the city could not defeat the petition by alleging non-compliance with the statute

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7 See Fredrichsen v. City of Lakewood, 491 P.2d 805, 809 (Cal. 1971) ("The city cannot frustrate plaintiff's attempt to comply with a statute enacted for its benefit and then assert noncompliance as a defense."); Filipo v. Chang, 618 P.2d 295, 300 (Haw. 1980) (government's assertion of "non-compliance with [procedures act] is unconscionable when it is the government's misfeasance and nonfeasance which are responsible for the non-compliance").

because the recorder had "fail[ed] to do her duty for the sponsors" and because the plaintiffs had done all they could to comply with the statute. Id. at 585.

Critically, this Court did not say that the plaintiffs were required or even allowed to submit home-made petitions when the city prevented filing. Rather, it merely stated that it would accept the uncertified copies of the certified original under the circumstances. Payson's inference that Taxpayers' should have made their own petitions is not appropriate. Unlike the city in Palmer, Payson did not accept the Application For Petition Copies and did not sign an original certificate. This distinction effectively made it impossible for the Taxpayers to employ the same type of conduct as the Palmer plaintiffs.

Because Payson's references are inapposite and Coleman v. Bench unequivocally supports the Taxpayers' position that Payson erred in not accepting the Taxpayers' Application For Referendum Petitions and in not issuing certified petitions, this Court should hold that Taxpayers' declaratory action is not time barred by Utah Code Ann. § 20-11-24(1).

B. Payson Refusal To Provide Taxpayers With Certified Referendum Petition Copies Created A Justiciable Controversy That Is The Proper Subject Of A Declaratory Action.

The Utah Declaratory Judgment Act expressly provides that any person "whose rights, status or other legal relations

are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute and obtain a declaration of rights, status or other legal relations thereunder." Utah Code Ann. § 78-33-2. Payson's refusal to provide Taxpayers with certified petition copies as required by Utah Code Ann. §§ 20-11-11 and 20-11-23(2)(a), (Appellants' Brief at 4-5), created an actual controversy between the parties in this action who are asserting adverse claims under Utah Code Ann. § 20-11-21. See Baird v. State, 574 P.2d 713, 715 (Utah 1978) (The conditions of a declaratory action are satisfied if "there is an actual conflict between interested parties asserting adverse claims on an accrued state of facts as opposed to a hypothetical state of facts."). Moreover, the issues between the parties to this case are ripe since Payson is currently using, and attempting to uphold, a state statute to prohibit the Taxpayers from exercising their state and federal constitutional rights to petition (by referendum or repeal initiative) their grievances and to engage in free speech. Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886 (1988). Thus, contrary to Payson's assertions, (Appellees' Brief at 16), all the conditions to maintain a declaratory action are met and this action is justiciable.[8]

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8 Declaratory judgments should be liberally granted under this statute. Four conditions are generally imposed to maintain a declaratory action: (1) a justiciable controversy; (2) the interest of the parties must be adverse; (3) the party seeking such relief must have a legally protectible interest in the controversy; and (4) the

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In addition, and again contrary to the Payson's assertions, (Appellees' Brief at 17-21), a declaratory action seeking a determination of a party's rights under a particular constitutional provision and a particular statute cannot become moot when the constitutional provision and statute are still in effect and the party's rights are subject to actual dispute. See Grant v. Meyer, 828 F.2d 1446, 1449 (10th Cir. 1987) (en banc), aff'd 486 U.S. 414 (1988); see also Energy Research Found. v. Foote, 628 P.2d 173 (Colo. Ct. App. 1981) (action seeking declaration of a party's rights under Nonresidential Buildings Act became moot when the Act was repealed); Salt Lake County v. Salt Lake City, 570 P.2d 119, 121 (Utah 1977) (declaratory judgment action should proceed if it "appear[s] either that there is actual controversy, or that there is a substantial likelihood that one will develop so that adjudication will serve a useful purpose in resolving or avoiding controversy or possible litigation").

In the present case there is both an actual controversy and the likelihood that entry of a declaratory judgment will resolve future controversy. (Appellants' Brief at 14-16). Even if Taxpayers could be viewed as being barred by Utah Code Ann. § 20-11-24(1) from filing a referendum petition against Payson's new municipal tax scheme, they would

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issues between the parties must be ripe for judicial determination. Baird v. State, 574 P.2d 713, 715 (Utah 1978).

not be precluded by that section from bringing a repeal initiative against the same tax scheme. See Op. Utah Att'y Gen. (Apr. 16, 1987) (1988 Initiatives seeking Tax spending Limitations, Tax Reductions and Income Tax Credit for Private Education) ("a statute may be repealed by means of the initiative" (quoting Klosterman v. Marsh, 143 N.W.2d 744 (Neb. 1966))); see also City of Fairbanks v. Fairbanks Convention & Visitors Bureau, 818 P.2d 1153 (Alaska 1991) (holding that an initiative which would repeal a motel and hotel tax was not an unconstitutional attempt to repeal an appropriation).[9]

Because the Taxpayers can bring a repeal initiative against the very same municipal tax scheme that they sought to refer in the first instance, entry of a declaratory judgment in this case is proper because it will resolve future controversy. Nonetheless, there is an actual dispute between the parties in this case as to whether Utah Code Ann. § 20-11-21 prevents the Taxpayers from referring or repealing a new municipal tax scheme. Thus, contrary to Payson's

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9 In City of Fairbanks v. Fairbanks Convention & Visitors Bureau, "the city certified for inclusion on the general election ballot a voter initiative to create a new arrangement for allocating [motel and hotel] tax revenues." 818 P.2d 1153 (Alaska 1991). The defendants challenged the inclusion of the municipal tax repeal initiative on the election ballot by seeking declaratory and injunctive relief on the grounds that the initiative was an unconstitutional attempt to repeal an appropriation. The Alaska Supreme Court ruled that although the initiative by "its own language" repealed the bed tax, it was not an unconstitutional appeal of an appropriation and thus was properly included on the election ballot. Id. at 1155-56.

assertions, Taxpayers' declaratory action is properly before this Court and should have been decided by the lower court.

Payson cites both Sullivan v. Board of County Commissioners of Arapahoe County, 692 P.2d 1106 (Colo. 1984), and Goose Hollow Foothills League v. City of Portland, 650 P.2d 135 (Or. Ct. App. 1982), for the proposition that Utah Code Ann. § 20-11-24(1) extends to actions for declaratory relief. (Appellees' Brief at 14-15). Section 20-11-24(1), however, only bars the filing of referendum petitions after thirty days have elapsed from the passage of an ordinance. This limitations period does not apply to actions for relief from inappropriate government action under Utah's Initiative and Referendum laws, i.e., the refusal to accept an application for petition copies. See id.

Furthermore, Utah has always taken the position, as expressly provided in the Declaratory Judgment Act, that the Act "'is to be liberally construed and administered'" for the purpose of (1) resolving an actual controversy, or (2) resolving or avoiding future controversy or litigation when there is a substantial likelihood that such controversy or litigation will occur. Salt Lake County v. Salt Lake City, 570 P.2d 119, 121 (Utah 1977) (quoting Utah Code Ann. § 78-33-12 (1953)).[10] More importantly, this Court has stated "the

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10 The issues presented in this case are likely to recur and evade review. In Meyer v. Grant, the United States Court declared that a plaintiff's initiative action was not moot even though the time for filing the petition and the time for the general election on the petition had passed, because the six month time period for obtaining

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court will be indulgent in entertaining actions brought to [resolve controversy]; and more particularly so, where there is a substantial public interest to be served by the settlement of such an issue." Id.

The presence of substantial public interest[11] as evidenced by the intervention of an amicus curiae, the opportunity for future controversy over the same municipal tax scheme through the filing of a repeal initiative and the actual controversy over whether Utah Code Ann. § 21-11-21 prevents the Taxpayers from referring or repealing a new municipal tax scheme indicate that this case is the proper subject of a declaratory action. Thus, this Court should rule that the Taxpayers are entitled to a declaratory judgment that

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petition signatures was too short for completion of the subject litigation and because the taxpayers were likely to be subjected to the same action again. This rule of law is determinative in this case. As in Meyer, the one month time period for obtaining petition signatures is too short for the completion of the litigation and the Taxpayers in this action are likely to be subject to the same petition rejection in the future.

11 Utah law provides that Utah courts may litigate an issue, which may be technically moot, if there is a strong public interest in the issue. Wickham v. Fisher, 629 P.2d 896, 899 (Utah 1981). In Wickham, this Court stated that where a matter gives "rise to constitutional issues" there is a strong public interest to resolve the issues. Id. In Olson v. Salt Lake City School District, 724 P.2d 960 (Utah 1986) this Court found that a local budgetary issue that affected the property tax mill levy was of sufficient public importance that it should be resolved judicially. The present matter involves a constitutional issue of the people's right to petition government on tax legislation and engage in free speech, this issue is of great public importance and should be judicially resolved by this court.

they may bring a referendum or repeal initiative against a new municipal tax scheme.

C. Approval Of The Pressurized Irrigation System Bond Did Not Ratify The Payson City Utility Tax.

Passage of the irrigation bond resolution did not ratify the Utility Tax.[12] The question placed before the people by the irrigation resolution essentially was "do you want us to spend your tax money repaying this bond issue." This question is entirely different from that presented by the referendum petition. The petition question is "do we want to raise additional taxes via a Utility Tax."

Ratification by the electorate can only occur if the question presented for ratification is specific and identical to the question originally passed. Ratification cannot occur by inference. Chemical Bank v. Washington Pub. Power Supply Sys., 691 P.2d 524, 537 (Wash. 1984) cert. denied, 471 U.S . 1065 cert. denied, 471 U.S. 1075 (1985); McQuillin, Municipal Corporations, § 29.109 (3d. 1990); see generally Lawrence v. City of Concord, 320 P.2d 215, 218 (Cal. 1958). Because legislative acts are frequently multifaceted, it is impossible to accurately determine whether the legislative body ratified a particular item discussed in the law, unless the ratification of the item is specific. Consequently,

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12 It is disingenuous for the Payson to argue that they have always interpreted Utah Code Ann. § 20-11-21 as not allowing the people the right to vote on "any tax levy" and then claim that they intended to give the people the opportunity to ratify the Utility Tax by voting for the irrigation bonds.

"[r]atification by inference is an ambiguous rule and dangerous doctrine" because it requires the court to "second guess" why the electorate adopted the act. Chemical Bank, 691 P.2d at 537.

The authorities Payson cites for its ratification contention are inapposite. The cases of Appeal of Sanborn Regional School Board, 579 A.2d 283 (N.H. 1990),[13] Tyler v. Common School District No. 76., 298 P.2d 215 (Kan. 1956),[14] and Oliver Iron Mining Co. v. Independent School District No. 35, 193 N.W. 949 (Minn. 1923),[15] cited by the Payson, confirm that ratification has to be specific.

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13 In Sanborn, the electorate voted to increase teachers salaries. The court ruled that this vote did not ratify a collective bargaining agreement previously entered into by the school board to raise the teachers salaries for three consecutive years. To ratify the three year agreement, the voters had to be forewarned that a vote for a one year raise could mean approval of raises for the second and third years.

14 In Tyler, the school district presented a single, compound question to the voters that asked whether they wanted to issue bonds to build a school on a particular parcel of ground. Because the resolution did not give the people the opportunity to separately vote as to whether they wanted the bonds and as to whether they wanted the school on the particular parcel, the resolution was illegal. Nonetheless, upon a favorable vote at the election, the district issued bonds. To cure the problems of the first election, the school district held a second, special election and "submitted a ballot to the people that offered the voters of the district an opportunity to vote on each [issue]." The court ruled that the favorable passage of the two specific questions at the second election ratified the prior election and any bonds that had be previously issued.

15 In Oliver, the school district entered into contracts to build new schools. At a subsequent election, the voters expressly ratified the school district's actions by voting to accept the contracts.

IV. UTAH CODE ANN. § 20-11-21(2) ONLY BARS THE REFERRAL OF THE PROPERTY TAX MILL LEVY. IT DOES NOT PREVENT THE REFERRAL OF THE UTILITY TAX.

Utah Code Ann. §§ 20-11-1 to 20-11-25 implement the people's constitutional right to refer "any legislation," and provides Taxpayers a statutory cause of action against Payson for not issuing the petition copies. Payson alleges that they did not violate § 20-11-11 because the use of the term "tax levy" is not ambiguous in § 20-11-21(2), and thus this Section bars the referral and initiative of all tax levies whether they are legislative in nature or not. Not only is this position unsupportable because it gives the statute an unconstitutional interpretation, but also because Payson's own memorandum confirms that the use of "tax levy" is ambiguous.

On page 27 of its Brief, Payson claims that "tax levy" means the "action of a legislative body [in] determining and declaring that a tax . . . shall be imposed. . . ." A tax levy is "not merely [a] ministerial action." (Appellees' Brief at 27). Despite Payson's initial conviction that "tax levy" has only one meaning and is legislative in nature, Payson quickly recanted and just 13 pages later (Appellees' Brief at 40-41) states that "tax levies," such as the Utility Tax, are not really legislative acts that exact a tax; but rather, are "administrative" acts by which the executive merely performs the ministerial task of assessing the proper rate for a previously approved tax.

Payson attempts to combine other "tax levies" within the scope of section 20-11-21(2) by claiming that "budget" and "tax levy" are inextricably intertwined and cannot be separated. This is erroneous.[16]

While taxes provide revenue that is considered in the budget, most tax statutes, e.g., income tax, franchise tax, sales tax, are separately enacted and separately repealed. The rates of these taxes do not change because the expected budgetary expenditures go up or down. Moreover, some of these tax levies are not even enacted by the city. In short, most tax levies are legislative acts that are independent of any particular annual budget. The only tax that is determined by each annual budget is the property tax mill levy. The rate for this tax varies each year and is determined by a statutory formula whose independent variables are the value of property in the county and the expected budget expenditures for the tax year. The rate so set is purely an administrative function

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16 When originally enacted in 1985, Utah Code Ann. §§ 20-11-21 and 20-11-27 (1985) excluded three distinct types of measures from referral: "a budget, mill levy, or zoning ordinance." In 1987, the legislature deleted zoning ordinances because court decisions had determined that at least some zoning ordinances were legislative in nature. Transcript, Senate Floor Debate on Utah Senate Bill 9, 1987 at 3. At that same time "mill levy" was changed to "tax levy." This changed in nomenclature was not intended to change the meaning of Utah Code Ann. § 20-11-21. See id. at 10 (even though the bill was amended to read "tax levy," the legislators continued to explain that "in its now amended form," the bill says you can't have a referendum on "a mill levy or a budget"). It should also be noted that in an effort to remove archaic language, the term "mill" was changed to "tax" throughout the Tax Code as part of the 1987 Tax Recodification Act.

once the value of the taxable property and the amount of proposed expenditures are established. When the Utah legislature enacted Utah Code Ann. § 20-11-21(2) it only intended to preclude referenda against the property tax mill levy. Any other reading of "tax levy" would cause § 20-11-21(2) to violate Utah Const. art. VI, § 1.

Moreover, as discussed in the Appellant's Brief at 17-22, the Utility Tax satisfies the Supreme Court's three tests for being legislative in nature: (1) it makes a new law, (2) it is permanent in nature and (3) it is the means of accomplishing a general public purpose. Payson attempts to rebut this conclusion by citing Denman v. Quin, 116 S.W. 2d 783 (Tex. Ct. App. 1938). Denman is not on point. Indeed, the Denman court went through the three tests used in Utah and found that the tax levy at issue in that case was administrative in nature; however, the tax levy involved in Denman was the ad valorem property tax mill levy. This is the very "tax levy" Taxpayers have said is administrative and subject to the referendum bar of § 20-11-21(2).[17]

Because "tax levy" may denote the legislative enactment of a new tax scheme or the administrative act of setting a rate for a pre-existing tax, it is necessary to review the intent of the legislature and give the statute a

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17 The property tax mill levy is administrative because (1) it does not make new law, it merely sets the rate for an existing property tax law; (2) it is not permanent because its rates change every year; and (3) it does not declare a particular public purpose as the object of its enactment.

constitutional construction if possible. As explained in Appellants' Brief at 34-37, the legislative intent of the statute reveals that "tax levy" means the property tax mill levy. Accordingly, Utah Code Ann. § 20-11-21(2) does not prevent the referral of the Utility Tax.

CONCLUSION

Finally, Payson makes much "a to do" about how a "handful of citizens who obtain enough signatures" could disrupt the efficient administration of a city if they could refer a budget or a tax levy. This statement is misleading for the reasons set forth below and almost sounds despotic.

First, the Utah Constitution was created by and for the "people" and, as such, the people retained the right to legislate through referenda and initiatives. Utah Const. art. VI, § 1. The "handful" of people required to refer legislation is more than Payson would have the Court believe. As many as 30% of the voters of a city may have to sign a petition to place it on a ballot. See Utah Code Ann. 20-11-22. If this many voters desire to review the issue, perhaps the elected officials need to listen to the people. "Government, after all, belongs to the people it serves." Wilson v. Manning, 657 P.2d 251, 256 (Utah 1982) (Howe, J. and Durham, J., dissenting).

Second, our cities functioned efficiently for over 92 years without the unconstitutional limitations of Utah Code Ann. § 20-11-21(2). The only restriction on the referral and

initiative right prior to 1985 was the constitutional requirement that the matter be legislative in nature. Interestingly, none of our cities were forced to ruin by the people during that time period. Why? -- because the people rarely engaged in the substantial effort of a referendum unless there was truly an egregious new tax, and when they did make the effort to challenge a new tax they got the attention of their elected officials and the situation was remedied.

Third, this case does not cause the city budget to sit in limbo for months waiting for a general election because: (1) this case does not concern a budget, (2) cities have the express authority to call a special election for a referendum, See Utah Code Ann. § 20-5-3, (3) the Utility Tax deals with a tax that was enacted in March and could have been resolved before it needed to be considered as a revenue source in the budget for the payment of capital improvements to the golf course, and (4) the Utility Tax is relatively small and any amounts not received under the Utility Tax could have been compensated for by making a small adjustment in the mill levy.

For the above reasons, Taxpayers request that the Court reverse the District Court's December 2, 1990 Summary

Judgment and enter an order pursuant to the request made in their Opening Brief.

DATED this 15th day of June, 1992.

HOLME ROBERTS & OWEN

Mark K. Buchi
David J. Crapo

CERTIFICATE OF MAILING

I HEREBY CERTIFY that pursuant to Utah Appellate Rule 26(b) I mailed in the U.S. mail, postage prepaid, four true and correct copies of the foregoing REPLY BRIEF OF APPELLANTS this 15th day of June, 1991, to the following:

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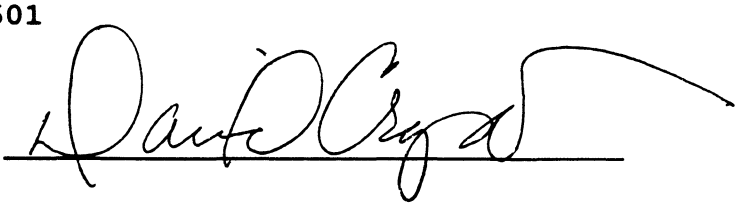

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BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

SANDRA BEYNON,	:	
Plaintiff/Appellant	:	**Case No. 91-0551**
vs.	:	
ST. GEORGE - DIXIE LODGE # 1743, BENEVOLENT & PROTECTIVE ORDER OF ELKS,	:	
		Priority No. 16
Defendant/Appellee	:	

REPLY OF APPELLANT SANDRA BEYNON TO AMICUS CURIAE BRIEF OF CONPOR

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY
THE HONORABLE PHILIP EVES, JUDGE PRESIDING
Trial Court Case No. 90-050-3229

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REPLY OF APPELLANT TO BRIEF OF AMICUS CURIAE CONPOR

APPEAL FROM THE FIFTH JUDICIAL DISTRICT COURT
IN AND FOR WASHINGTON COUNTY
THE HONORABLE PHILIP EVES, JUDGE PRESIDING
Trial Court Case No. 90-050-3229

Plaintiff\Appellant, **SANDRA BEYNON** (hereinafter "Ms. Beynon"), by and through her counsel of record John Pace and Brian M. Barnard of the Utah Legal Clinic on behalf of the Utah Civil Rights and Liberties Foundation, Inc., submits the following **BRIEF** in response to the *amicus curiae* brief filed by the Conference of Private Organizations (hereinafter "CONPOR" or "*amicus*") and dated October 15, 1992.

STATEMENT OF FACTS

The statement of Essential Facts on Appeal by the CONPOR is remarkable in several ways. *Amicus* CONPOR Brief (hereinafter "CONPOR Brief") at 2-3. There are no citations to the trial record. Several "facts" mentioned are not of record in this case (whether true or not) and many are irrelevant-- for example, the defendant/appellee, St. George-Dixie Lodge #1743, Benevolent and Protective Order of Elks (hereinafter the "Lodge" or the "Elks Lodge") has an "occupancy permit" for its building and a "health permit" for its dining facility, the Lodge does not receive public funds, the Lodge's building is not on public property, the Lodge gets its electricity and water from the municipal systems, etc.[1] Given its displayed lack of knowledge of the

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[1] Perhaps these "facts" were just left on a word processor from when CONPOR filed an **amicus** brief in some other case. Similarly, CONPOR's lengthy discussion of "state action" (CONPOR **Amicus** Brief, pp. 5-12) seems to be taken from another brief and shoved into CONPOR's brief herein. "State action," which might be relevant under a 14th Amendment analysis in federal court, is not relevant in this case.

CONPOR also seems to think that plaintiff wants the Court to order the state to remove or deny defendant a liquor license (Id., p. 4; p. 5; p. 17) plaintiff has not so requested in this action. Denial of or the removal of the defendant's liquor licenses has never been an issue.

Needless to say if the St. George Elks Lodge were to give up its state liquor and beer licenses, it would no longer be "an enterprise regulated by the state" subject to the Utah Civil Rights Act. The Civil Rights Act would then

issues and facts of this case, CONPOR's service to the Court as an *amicus curiae* in this case must be questioned.

SUMMARY OF ARGUMENT

The "male-only" membership policies of the Elks Lodge violate the Utah Civil Rights Act. No reading of the statute nor arguments forwarded by the CONPOR can put the Lodge's discriminatory practices beyond the reach of this important civil rights legislation. Indeed, the blatant gender discrimination by the Lodge -- coupled with the fact that this conduct is associated with the auspices of the state -- represents the exact behavior that Utah's anti-discrimination statute declares unlawful. When the Elks Lodge specifically excludes women from its membership, it perpetuates the offensive and humiliating effects of gender discrimination and endangers the health and welfare of Utah's citizens.

To guarantee all individuals "full and equal availability of all goods, services and facilities" regardless of their sex, the Utah Civil Rights Act forbids gender discrimination by all business establishments and

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apply only because the Elks Lodge is a "business establishment."

enterprises regulated by the state. U.C.A. §§ 13-7-1, et seq. (1953 as amended). The Lodge -- engaged in public and commercial activities -- is a business establishment for the purposes of the Act. In addition, as the beneficiary of state beer and liquor licenses, the Lodge is an enterprise regulated by the state.

Accordingly, the Elks Lodge cannot legitimately plead exemption to Utah's civil rights legislation. The Lodge has long forsaken any claims of intimacy and private association by actively seeking and accepting state licenses to sell beer and alcohol and by offering its facilities and services to the public. Far from occurring in surroundings analogous one's home and amongst individuals who share relationship similar to family members, the gender discrimination practiced by the Elks Lodge takes place publicly, commercially and pervasively.

Finally, given the distinct trend in other jurisdictions to prevent male-only clubs from excluding women as members, application of the Utah Civil Rights Act to the Elks Lodge is over due. Importantly, civil rights legislation with narrower sweeps and less exacting texts than the Utah statute has been repeatedly interpreted as prohibiting the exclusionary membership policies adopted by

the Lodge. Case law which has enforced language and purpose similar to that of Utah lawmakers also confirms that the statute prohibits the Lodge's discriminatory conduct. In light of the firm legal, policy, and moral foundations for Ms. Beynon's claim that she is entitled not to be classified and restricted based solely upon her gender, CONPOR's arguments necessarily fail.

ARGUMENT

I. Enforcement of the Utah Civil Rights Act Against the Elks Lodge is Not Dependant on the Presence of State Action.

Demonstrating unfamiliarity with state civil rights legislation in general, and the Utah Civil Rights Act in particular, CONPOR expends considerable space and effort to argue that Utah's licensing of the Lodge is insufficient to constitute state action.[2] *Amicus* CONPOR's Brief at 5-12. However, Ms. Beynon's claim is not based upon the federal Bill of Rights nor upon the power of Congress to regulate conduct under the federal commerce clause. Instead, Ms. Beynon asserts that the Lodge's discriminatory membership practices violate the Utah Civil Rights Act -- state

[2] Interestingly, CONPOR cites only federal cases in its *amicus* brief, seeming to ignore that this is a state claim brought in state court under Utah's unique state civil rights statute.

legislation enacted pursuant to Utah's authority to police the health and safety of its citizens. Such regulatory "police" power clearly belongs to Utah. In any case, the Lodge has not challenged the authority of the state to prohibit discrimination and defends itself in this action by maintaining that the Utah Civil Rights Act was not intended to reach Elk Lodge activities.

The Utah Attorney General, as a statutory party to this action, also confirms that "state action" is not relevant to this case:

> Although Utah could probably show "state action" in its farther-reaching involvement as an active market participant in the liquor industry, it is a completely different question of whether Utah may **prohibit** discrimination, as an additional regulation upon the liquor industry as part of its police powers.

Brief of Attorney General at 18 (emphasis original).[3] Ms. Beynon's claim has never rested upon state action and the application of federal anti-discrimination protections, but

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[3] As the Attorney General points out in his Brief, the Lodge shares CONPOR's confusion of the issues in this case. Many of the Lodge's arguments for exemption from Utah's antidiscrimination statute mistakenly rely upon federal civil rights claims that are ultimately decided upon the matter of state action. Because the question of state action is not before this Court, the relevancy of these is cases is minimal. *See*, Moose Lodge No. 107 v. Ivris, 407 U.S. 124 (1972) (a state licensing scheme insufficient state action for the purposes of federal equal protection law).

instead is based upon state protections and the authority of the state to regulate the conduct of persons, even private actors within the state. Accordingly, state action is not an issue before this Court.[4]

II. The Elks Lodge is Subject to the Utah Civil Rights Act.

As a business establishment and an enterprise regulated by the state, the Lodge is prohibited from discriminating against Ms. Beynon on the basis of her sex. A holder of state licenses to sell beer and alcohol, the Lodge has solicited and submitted to state supervision including the state legislation which prohibits gender discrimination. In addition, the Lodge conducts itself as a business, making

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[4] In arguing that there is no state action in this case, CONPOR advances other unpersuasive contentions. For example, the *amicus* contends that a practicing attorney -- presumably in Utah -- can refuse to represent a client for any discriminatory reason. CONPOR fails to realize that the Utah Civil Rights Act specifically prohibits an attorney from discriminating against clients on the basis of an invidious classification. A practicing attorney in Utah is a business establishment and her office is a place of public accommodation for the purposes of the Utah Civil Rights Act and her conduct is subject to the state's antidiscrimination mandate.

Oddly, CONPOR also warns (or imagines) that application of the Utah Civil Rights Act to the Lodge would open religious organizations to regulation by the state. CONPOR's Brief at 10. Again the *amicus* exhibits unfamiliarity with Utah's civil rights legislation which specifically exempts churches from the reach of the statute. U.C.A. § 13-7-3 (1953 as amended).

substantial sums of money by selling liquor, beer and food, running what is essentially a public restaurant, and renting its facilities to the public. The Lodge's business-like traits -- including its utilization of its state liquor and beer licenses -- coupled with its solicitation and acceptance of state regulation indicate that the Elks Lodge is well within the reach of Utah's anti-discrimination edict.[5]

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[5] Throughout its brief, CONPOR repeatedly stresses that a liquor license issued to a "private" club such as the Lodge, is a substantial benefit to the club. Indeed, CONPOR would consider the denial or cancellation of this license to be akin to punishment of the Lodge. CONPOR Brief at 4-5 (*for example*, "Plaintiff and the Attorney General do not seek redress **but punishment of the Lodge by imposition of a financial hardship through removal of their** [sic] **liquor license.**") (emphasis added). CONPOR's admission underlines the extent to which the Lodge is a beneficiary of state privileges and state regulation and the extent to which these privileges are essential to the economic well-being of the Lodge. CONPOR's emphasis upon the importance of the Lodge's commercial nature -- centered around the selling of beer and alcohol -- only reaffirms Ms. Beynon's assertion that the Lodge is a business. In addition, CONPOR points out that the commercial success of the Lodge is dependent on a state privilege. Because Utah lawmakers determined that whenever extensive state regulation entangle the state in the affairs of the monitored enterprise -- and CONPOR points out how extensive and important this entanglement is -- discrimination could not be tolerated for fear that this undesirable conduct would be encourage by or associated with the state's presence and support.

When CONPOR suggests that Ms. Beynon is seeking to punish the Lodge, CONPOR is in error. Ms. Beynon seeks redress only in the form of injunctive and declaratory relief, not in the form of money damages. Ms. Beynon is only asking this Court to enforce the law and put an end to the Lodge's invidious discrimination.

A. The Elks Lodge is an Enterprise Regulated by the State.

The purpose, the language and the policy of the Utah Civil Rights Act all command otherwise, nevertheless CONPOR argues that the statute is not applicable to the Elks Lodge. Ignoring the directive that the Utah Civil Rights Act is to be liberally construed, CONPOR suggests a narrow reading of "enterprises regulated by the state" to exempt the Lodge from the statute.[6] Yet, CONPOR offers no credible reasons as to why the Lodge -- a beneficiary of state beer and liquor licenses and subject to supervision by the state -- is not an enterprise or business regulated by the state.[7]

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[6] CONPOR asserts without citation to any authority that enterprises regulated by the state "must be considered in connection with the more limiting language describing business establishments and places of public accommodation." CONPOR Brief at 15. Yet, CONPOR fails to note that the statute does not limit or define "business establishments" in any way. Indeed, the similar absence of a definition or a listing of examples of "business establishments" prompted the California Supreme Court to interpret the term as broadly as reasonably possible. Burks v. Poppy Construction Company, 370 P.2d 313 (Cal. 1962).

[7] CONPOR argues that the Lodge is not an enterprise regulated by the state by pointing to supposed contradictions in the Attorney General's Brief. First, CONPOR misstates the Attorney General's position, wrongly insisting that the Attorney General "acknowledged that the Lodge is not a 'business' within the meaning of the term 'business establishment' because it is not open to the public and is not operated for profit." CONPOR Brief at 16. Actually, the Attorney General merely noted that the definition of "business establishments" would include "all profit motivated or commercially oriented entities . . ." Indeed, the Attorney General then argued that the Lodge is a

If CONPOR's less than reflective interpretation of the Utah Civil Rights Act were adopted, the legislative intent to have the Act construed liberally would be frustrated. In addition, the 1973 amendment to the Utah Civil Rights Act, meant to extend the application of the act to enterprises regulated by the state, would be made superfluous. Because the Act before 1973 already prohibited discrimination in "all business establishments," the new provision including enterprises regulated by the state must be read as expanding the scope of Utah's civil rights legislation beyond business establishments. Accordingly, "business" for the purpose of state regulation after 1973 cannot be limited to those "business establishments" subject to the Act prior to 1973.

By expanding the scope of Utah's civil rights legislation in 1973 to reach enterprises regulated by the state, Utah lawmakers expressed deep concern that invidious discrimination not be associated with state regulation, authorization or privilege. Lawmakers determined that when discrimination has the appearance of state assistance or

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"business" for the purposes § 13-7-2 (3)b of the Utah Civil Rights Act. Brief of Attorney General, pp. 6 et. seq. Second, CONPOR ignores Ms. Beynon's extensive arguments and references to state case law which indicate that the term "business establishment" includes more than just profit motivated entities open to the general public. Appellant's Reply Brief at 12-20.

approval, it is particularly objectionable. Thus, a proper interpretation of the Act is that exactly because the Elks Lodge is licensed by the state to sell beer and liquor, it is an enterprise regulated by the state. Utah does not allow truly private actors, ordinary citizens, to sell beer and alcohol from their residences, and therefore the state considers every entity that it licenses to sell beer a business.

B. The Elks Lodge is a Business Establishment

Further, CONPOR's argument that the Elks Lodge is not a business which sells beer and alcohol and is not a business establishment rests on the same misconception that a non-profit membership organization cannot be a business. However, a multitude of state and federal court decisions have held otherwise. United State Jaycees v. McClure, 305 N.W.2d 764, 768-769 (Minn. 1981); Roberts v. United States Jaycees, 468 U.S. 609 (1984) (local chapters of the Jaycees held to be "business facilities" for the purpose of the Minnesota Civil Rights Act although a nonprofit membership organization); Rotary Club of Duarte v. Bd. of Dirs. of Rotary International, 224 Cal.Rptr. 213 (Cal.App.2 Dist. 1986), Bd. of Dirs. of Rotary International v. Rotary Club, 481 U.S. 537 (1987) (Rotary Club, a private, non-profit

corporation, a "business establishment'); O'Connor v. Village Green Owners Association, 662 P.2d 427 (Cal. 1983) (condominium association, **a non-profit association**, a "business establishment"); Isbister v. Boys' Club of Santa Cruz, Inc., 707 P.2d 212 (Cal. 1985) (Boys' Club, **a private, non-profit corporation**, affiliated with the Boys' Club of America, a "business establishment"); Curran v. Mount Diablo Council of Boy Scouts, 195 Cal.Rptr. 325 (Cal.App.2 Dist. 1983) (Boy Scouts, a **non-profit organization** a "business establishment"); Warfield v. Peninsula Golf & Country Club, 262 Cal.Rptr. 890 (Cal.App.1 Dist. 1989) (a **non-profit, privately owned and operated, social and recreational club** a "business establishment"); Lloyds Lions Club v. Int. Association of Lions Clubs, 724 P.2d 887 (Or.App. 1986), petition for review dismissed, 740 P.2d 182 (Or. 1987) **(nonprofit, private, selective membership club)**.

As are the various organizations involved in the foregoing cases, the Lodge is a non-profit, membership organization that is a business for the purposes of the relevant civil rights legislation. The Lodge exhibits enough of the characteristics of a commercial enterprise, and is sufficiently open to the public to constitute a business. In addition to its state licenses to sell beer and alcohol, the Lodge has a St. George City business

license. Brief of Appellant at 10. In return for the privilege of being granted these state licenses, the Elks Lodge must have a current city business license and must abide by extensive state guidelines that govern the distribution of beer and liquor. Alcoholic Beverage Control Act, Title 32A, Utah Code Ann. (1986). Far from a small or intimate operation, the Elks Lodge sells one-quarter of a million dollars ($250,000.00) of liquor annually and has assets that exceed one million three hundred thousand dollars ($1,300,000.00+). Appellant's Brief at 10. For example, for the 1986 fiscal year, the lodge earned $25,197.00 from rental of its facility.

Interestingly, a Michigan State Circuit Court recently ruled that under its Elliot-Larsen Civil Rights Act, Michigan Complied Laws (MCL) §§ 37.101, *et seq*,[8] the Rochester Michigan Elks Lodge was prohibited from rejecting a woman's membership application solely on the basis of her gender. Schellenberg v. Rochester, Michigan Elks Lodge No. 2225, No. 88-351-793-NZ (Mich.Cir.Ct. Nov. 15, 1989), decision attached as Exhibit "D". This ruling was based upon the commercial and public nature of the Rochester Lodge. Even though the Michigan Civil Rights Act prohibits

[8] MSA 3.548(101), *et seq*.

discrimination only in places of **public** accommodation "whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available **to the public,**" MCL 37.2301(a) (emphasis added), the Court had no difficulty in finding that the Rochester Lodge was a place of public accommodation. Id. at A.7. Significant to the Court's conclusion was that the Lodge "operated a *de facto* restaurant." Id. The Lodge also held weekly bingo games and an annual craft show open to the public. Id. Also contributing to the Court's determination that the Rochester Lodge dining facility was essentially public was the observation that although the Rochester Lodge dining room was theoretically open only to members and their guests, food and drinks were ordered and paid for without a showing of membership. Id. at A.5

Like its Rochester counterpart, the St. George Elks Lodge is an open and commercial enterprise. The St. George Lodge's dining and banquet facilities are open for private and business functions to its members, their families, their employers and their guests. Appellant's Brief at 11. In addition to serving food and beverages to lodge customers, the Elks Lodge is used for receptions, business meetings and parties and defendant rents the facility to the public for

similar events.[9] Id. Non-members and members alike order and pay for food, drink and services they receive at the lodge, placing the lodge in direct competition with other businesses in St. George that also sell food and beverages. Id. Indeed, Ms. Beynon, obviously without a showing of membership, has purchased beer and wine at the lodge during the four (4) years prior to this suit. Id. at 11-12.

The same factors which convinced the Michigan trial court that the Rochester Elks Lodge was a place of public accommodation are present in the instant case.[10] The public and commercial nature of the St. George Lodge confirms that it is both a business that sells beer and alcohol and a business establishment.

III. Federal First Amendment Guarantees of Freedom of Intimate and Expressive Association Do Not Prohibit Application of the Utah Civil Rights Act to the Elks Lodge.

Truly private clubs are protected from state regulation by the right to freedom of association. Although CONPOR argues otherwise, the Lodge does not qualify as an intimate

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[9] For a non-member to rent the facility, she or he need only be sponsored by a member who must be present during the event.

[10] The Schellenberg case now on appeal was argued before the Michigan Court of Appeals on November 4, 1992, Case Nos. 123738, 131716.

or expressive association. For many of the same reasons that the Lodge is an enterprise regulated by the state and is a business enterprise, it has relinquished any status as a truly private club. As emphasized above, the Lodge maintains a public and commercial profile, profiting from the state licensed sale of beer and liquor and from the rental of its facilities to the public. Because the Lodge has opened itself to state regulation, it cannot simultaneously claim immunity from state anti-discrimination supervision.

Further factors confirm that the Lodge is not entitled to First Amendment protection -- the Lodge is not a small, intimate, selective organization. The United State Supreme Court has consistently held that the essence of privacy is selectivity. Tillman v. Wheaton-Haven Recreation Association, 410 U.S. 431, 438 (1973); Sullivan v. Little Hunting Park, 396 U.S. 229, 236 (1969). If there is little or no selectivity in a club's membership, there is no basis to claim privacy. Roberts v. United States Jaycees, 468 U.S. 609 (1984); Bd. of Directors of Rotary International v. Rotary Club, 481 U.S. 537 (1987). The Lodge has the burden of establishing that its is deserves First Amendment protection. United States Power Squadrons v. State Human Rights Appeal Bd., 542 N.E.2d 1199, 1204 (NY 1983) ("[Club

members] have the burden of establishing its entitlement to exclusion. It is they who are familiar with the policies and practices of the club and have available the documents and records necessary to establish their claim.").

To reject the claim by the Rochester Elks Lodge of private club exemption under the Michigan Elliot-Larsen Civil Rights Act and to First Amendment protection, the Michigan Circuit Court emphasized that the "factors of size and selectivity weigh heavily against finding [the Rochester Lodge] to be a private club." Rochester Elks Lodge, *supra* at A.8. Analyzing the identical admission criteria involved in the case at bar, the Michigan Court determined that at the Rochester Lodge, "membership procedure is a mere formality. No significant process of selection can be found in a process that weeds out less than two percent of the applicants."[11] Id. Unimpressed by the Elks' list of

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[11] The Michigan Court found no difficulty in distinguishing Cornelius v. Benevolent Protective Order of the Elks, 382 F.Supp 1182 (D.Conn 1974), which found a Connecticut Elks Lodge to be a private club under federal civil rights law. In Cornelius there was no evidence to counter the claim by the Connecticut Lodge that its membership procedure was genuinely selective. Rochester Lodge at A.8; Cornelius at 1204. Cornelius also predated, by a decade, the Roberts, *supra*, and Rotary, *supra*, decisions, in which the United States Supreme Court examined the size, purpose, policies, selectivity and other relevant characteristics of each club. In contrast, the Michigan Court noted that Ms. Schellenberg had introduced convincing documentation that the Rochester Lodge was not a genuinely

membership standards, the Michigan Court noted that "[n]early all of the applicants who follow though with the [membership] process are accepted." Id. at A.4. Significantly, the Rochester Lodge had 1,800 member, and over the part 15 years, only 20 applicants had been rejected. Id.

Like the Rochester Lodge, the St. George Lodge is an organization with a large membership and without a genuinely selective membership procedure. Like the Rochester Lodge, the St. George Lodge is not a truly private club. Although the Elks Lodges list ten (10) characteristics as its membership standards, these criteria are not applied to create a selective, intimate organization. Most, if not all, men who apply are allowed to join the Lodge. Three St. George Elks Lodge members testified that during their thirty one (31), thirty eight (38), and twenty nine (29) years of membership, they witnessed respectively, the rejection of no applications, maybe ten (10) applications and one (1) application for membership. Appellant's Brief at 8. From January, 1987 through June, 1989, the St. George Elks Lodge members approved every application for membership presented to them. Id. During those two and one half years, the

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selective club. Rochester Lodge at A.8. For further discussion of Cornelius, see Appellant's Brief at 9-12.

investigation committee, whose duty it was to review the qualifications of all applicants, never issued a negative report on any applicant. Id.

Nor is the St. George Lodge a small and intimate association. While about ten percent (10%) of the membership drops out of the organization each year, the Lodge annually increases its membership by fifteen percent (15%). Appellant's Brief at 8-9. At various Lodge meetings, Lodge members are repeatedly encouraged to recruit new membership. Id. Although the St. George Elks Lodge can have members only from Washington County, Utah and small adjoining areas of Nevada and Arizona, the lodge enjoys a large membership of more than one thousand (1,000+) men. Id. This figure represents more than 6% of the male population in Washington County and more than 8% of the male population in St. George City. Id. There is no limit on the number of men that can be members of the Elks Lodge.

Because the Lodge has not conducted itself as a truly private club, it cannot claim First Amendment immunity from the reach of the Utah Civil Rights Act. Rather than maintaining selective membership standards, the Lodge has solicited a large membership and has admitted virtually every male that has wished to join. By offering its facilities for rent and by running a restaurant in which

non-members can purchase food and alcohol, the Lodge has opened itself to the public and lost any basis for a claim of protected privacy. Finally, the Lodge has accepted state licenses to sell beer and alcohol, voluntarily submitting to government supervision which necessarily falls upon the beneficiaries of these state privileges. No truly private organization invites a state regulating body into its inner sanctum.

CONCLUSION

The St. George Elks Lodge is not insulated from the reach of the Utah Civil Rights Act. Utah has determined that individuals and our society are entitled to be free from the poisonous effects of unlawful discrimination. The Lodge has chosen to openly participate in our society, offering its services and facilities to the public, soliciting state benefits and profiting from state privileges. Yet, when asked to abide by the state enacted antidiscrimination law which serves the health and welfare of this society, suddenly the Lodge wants out. The Lodge does not want to treat the individuals who make up our society with equal respect. The Lodge wants to openly and unabashedly deny Ms. Beynon access to its goods, services and benefits simply because she is a women. This

discrimination is unfair, undesirable, and most importantly, unlawful.

For these reasons and in the interest of justice, this Court should reverse the ruling and decision of the trial court, determine that the Utah Civil Rights Act applies to the Lodge and remand this case with instructions to the trial court to enter judgment in favor of Ms. Beynon granting declaratory and injunctive relief to end the illegal gender discrimination practiced by the Lodge.

DATED this 13th day of NOVEMBER, 1992.

UTAH LEGAL CLINIC
Attorneys for Plaintiff/
Appellant

by _____
BRIAN M. BARNARD
JOHN PACE

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed four (4) true and correct copies of the foregoing REPLY BRIEF OF SANDRA BEYNON TO AMICUS CURIAE BRIEF OF CONPOR to:

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B:\BEYNON.ACR\ELKS

EXHIBIT

OPINION IN

SCHELLENBERG vs. ROCHESTER, MICHIGAN ELKS LODGE

CIRCUIT COURT FOR OAKLAND COUNTY, MICHIGAN

CASE NO. 88-351-793 NZ

NOVEMBER 15, 1989

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SHARON LEE SCHELLENBERG,

Plaintiff,

vs.

Civil Action
No. 88-351-793-NZ

ROCHESTER, MICHIGAN LODGE NO. 2225 OF THE BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE USA, a non-profit Michigan corporation,

Defendants.

A TRUE COPY
LYNN D. ALLEN
Oakland County Clerk Register of Deeds
By P. Lynch
Deputy

OPINION

This Court has before it the parties' motion for a judgment on stipulated facts. MCR 2.116(A). Plaintiff brings this action under Section 302 of the Elliot-Larsen Civil Rights Act, MCL 37.101, et seq, MSA 3.548(101), et seq, alleging that she has been denied full and equal enjoyment of the services of a place of public accommodation or public service because of sex. Defendant admits that it has refused plaintiff membership in its organization but argues that it is not a place of public accommodation or public service as those terms are defined in the Act. Rather, defendant argues that it is a private club under Sec. 303 and therefore, exempt from the provisions of Sec. 302.

Plaintiff is a realtor in the City of Rochester. For approximately seven years prior to this litigation she had enjoyed some of the defendant's services and facilities. Plaintiff frequently ate lunch in the defendant's dining room on work days with business associates. The local Board of Realtors often rents the defendant's facility for its meetings, which plaintiff attends. Plaintiff also takes her mother to the Elks Club for bingo on Wednesday nights. Plaintiff testif-

PLAINTIFF/APPELLANT'S
EXHIBIT "D"

that she ate at defendant's club so frequently that the doorperson would let her in without her showing any proof that her husband was a member.

In February, 1988, plaintiff completed a written application for membership naming a sponsor member and two member references. Plaintiff wanted to join the Elks primarily because it was a convenient and customary place for lunch on weekdays. Also, it was an appropriate place where she could take her parents for dinner and dancing. It is not disputed that plaintiff's application was denied solely because she is female.

Defendant is a local chapter of the Benevolent and Protective Order of Elks of the United States of America (BPOE). Defendant is incorporated in this state as a fraternal association pursuant to MCL 457.301; MSA 21.1291 and MCL 450.133; MSA 21.134. Pursuant to defendant's Articles of Incorporation, it was formed, "to inculcate the principals of Charity, Justice, Brotherly Love and Fidelity to promote the welfare and enhance the happiness of its members; to quicken the spirit of American patriotism; to cultivate good fellowship; to perpetuate itself as a fraternal organization; and to provide for its government." Defendant is a non-profit tax-exempt corporation. In its promotional brochure, What it Means to Be an Elk, pp 15-16, the Elks national office proclaims:

> The primary object of the Order is the practice of charity in its broadest significance, not merely that of alms giving.
>
> * * *
>
> For many years the aggregate expenditures of the Subordinate Lodges for charitable purposes have run into millions of dollars each year, covering humanitarian services of infinite variety. Among the mos[illegible]l of such activities may be mentio[illegible]ne following: food

> to the hungry; shelter for the homeless; clothing and fuel for the needy; milk for the under-nourished babies; medical attention to the sick; baskets to the poor at Christmas and Thanksgiving; outings for underprivileged children; entertainments for shut-ins; education for young people; artificial limbs for the maimed; hospital beds; free clinics; night schools. And the list might be indefinitely extended.
>
> All of the State Elks Associations have undertaken important and extensive charitable works within their own several jurisdictions, determined by the particular conditions therein existing and the preferences of their constituent members. They include rehabilitation of crippled children, treatment of indigent tubercular patients, provision for scholarships to worthy students, maintenance of orphans, boys' camps, training of the blind, eyeglasses for needy boys and girls, cerebral palsy clinics, cancer clinics, and other state wide projects of similar character and of equal worthiness, which are being carried on as continuing activities. No history of social service in the United States would be complete without an inspiring chapter devoted to the achievements of the Order of Elks in this field.

Membership in the Elks is limited to male citizens of the United States of America not under the age of 21. Elks Constitution, Art VII, Sec 4. Potential members must also be believers in God and possess good moral character. Elks Annotated Statute, § 14.010. Communists and persons who advocate the overthrow of the government by force are not permitted to join. Id.

The Benevolent and Protective Order of Elks has about 1.5 million members nationwide and about 50,000 members in 78 lodges in this state. In August, 1988, the defendant had 1,84, members. In 1987, 126 men applied for membership with defendant. One was rejected and three withdrew their applications. In 1986, 119 men applied for membership with the defendant. One was rejected because he was not a United States citizen

and three withdrew their applications. In 1985, 117 men applied for membership. None were rejected though five withdrew their applications. During these most recent years less than two percent of all applicants were rejected. Over the past 15 years only 20 applicants have been rejected.

The defendant recruits new members primarily through members' social contacts. Members are encouraged in the monthly newsletter to seek new members from among their friends. The recruit submits an application naming the sponsor member and two member references. If the application indicates that the applicant meets the four basic membership requirements the applicant is invited to sit for an interview. The interview is fairly short and informal. One member of the investigating committee who performed interviews stated that throughout over 100 interviews that he had performed, he had recommended every applicant for membership. The applicant is considered for membership by the members in a vote. Three negative votes results in rejection of the applicant. Nearly all of the applicants who follow through with the process are accepted.

The defendant charges its new members an initiation fee of $75 and each member pays annual dues of $75. Dues and fees account for approximately 70% of defendant's annual receipts. Defendant's next largest source of income is from rental of its facilities to other organizations. For example, in 1987 and 1988, defendant rented its facilities to about 20 different organizations on about 90 different occasions. In 1988, rentals accounted for approximately 13% of defendant's income. Defendant derives approximately nine percent of its income from weekly bingo nights and less than two percent of its income from advertisements placed in its local newsletter. Defendant operates a dining room or restaurant for its members and their guests

but does not appear to derive a profit from this activity.

The parties stipulated at oral argument that only three percent of the defendant's income is directed to charitable organizations and activities. Defendant contributes $1 per member annually to the statewide Michigan Elks major projects. Defendant sponsors an annual hoop shoot for local youths and assists a local law enforcement agency in its drug awareness program.

The defendant operates a dining room as one of the services it provides to its members. According to the defendant's own rules, the dining room is supposed to be open only to members and their guests. Guests are not supposed to be allowed to purchase their own alcoholic beverages or food. However, before this litigation commenced these rules were not enforced. One of defendant's own waitresses, Janice Kline, stated that she regularly provided separate checks for guests who requested separate checks. She was never told not to do this. She also served food and drinks without requesting to see membership identification. Two of plaintiff's female business associates stated that they have used defendant's dining hall even though they were not members. No one in their group was ever asked to show identification. They all received separate checks and paid for their own meals.

The issue before this Court is whether the defendant's decision to reject plaintiff's application solely on the basis of sex violated the Elliot-Larsen Civil Rights Act. Section 302 of the Act provides:

> Sec. 302. Except where permitted by law, a person shall not:
>
> (a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accom[illegible] or public service because of re[illegible] race, color, national origi[illegible] sex, or marital status.

For purposes of this Section, defendant is a person.

MCL 37.2103(f).

MCL 37.2301(a) and (b) define place of public accommodation and public service as follows:

> (a) 'Place of public accommodation' means a business or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.
>
> (b) 'Public service' means a public facility, department, agency, board, orby or commission, owned, operated, or managed on behalf of the state, a political subdivision, or an agency thereof, or a tax exempt private agency established to provide service to the public.

There is no Michigan case law further defining what constitutes a "public service" under the above-quoted statute. However, it is undisputed that defendant is a tax-exempt corporation. Furthermore, defendant's promotional literature makes clear that the primary object of the defendant is the practice of charity in its broadest significance including such activities as providing food for the hungry, shelter for the homeless, clothing for the needy and medical attention to the poor. Clearly, this is service to the public.

At oral argument defendant's counsel repeatedly argued that *defendant currently donates only three percent of its* income to charitable causes. This Court would observe that the definition of public service looks to whether the agency was "established" to provide public service. Whether defendant has in fact all but abandoned the laudable purposes for which it was established has no bearing on the fact that defendant was established to provide public service. Therefore, this Court finds that defendant is a "public service" as that term is defined in the Act.

Having found defendant to be a public service it is not necessary that this Court determine whether defendant is a place of public accommodation. Traditional places of public accommodation include hotels and restaurants. Concord Rod & Gun Club, Inc v Massachusetts Commission Against Discrimination, 402 Mass 716; 524 NE2d 1364 (1988). In this case, defendant operated a de facto public restaurant. Further, they opened to the public for weekly bingo games and annual gift and craft shows. Therefore, this Court concludes that defendant is a place of public accommodation.

Defendant argues that even if it falls within the definitions of § 302, it is entitled to the private club exemption under § 303 of the Act:

> Sec. 303. This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state under Act No. 8 of the Public Acts of 1933, being sections 436.1 through 436.58 of the Michigan Compiled Laws. MCL 37.2303; MSA 3.548(310).

In Rogers v International Association of Lions Club, 636 F Supp 1476, 1479 (ED Mich 1986), the Court considered four factors in determining the Lions Club was not a private club under this Section: "The organization's size, selectivity, public services offered, and use of public facilities." The Court placed special emphasis on selectivity. In Cornelius v Benevolent Protective Order of the Elks, 382 F Supp 1182 (D Conn 1974), the Court considered eight factors in determining that the Groton, Connecticut Elks Club was a private club under similar federal legislation. The Court found that the most significant factors were selectivity, formal membership procedure

and membership control over the admission of new members. In the absence of controlling Michigan case law, federal case law may be helpful in deciding civil rights cases. Bouwman v Chrysler Corp, 114 Mich App 670, 678 (1982). However, this case must be decided on its own facts.

In this case the factors of size and selectivity weigh heavily against finding defendant to be a private club. Defendant has over 1,800 members and the only limitations on its size are recently self-imposed. Nationally, there are 1.5 million members. Like the Lions, the Elks are potentially unlimited in size. Rogers, supra, p 1479. The defendant has the same formal membership procedure as was outlined in Cornelius, supra. This case is distinguishable from Cornelius in that plaintiff has presented facts showing that the membership procedure is a mere formality. No significant process of selection can be found in a process that weeds out less than two percent of the applicants, most of whom were disqualified for reasons pertaining to citizenship. As stated in Rogers, supra, p 1480, "the essence of privacy is selectivity. If there is little or no selectivity, there is no basis to the claim of privacy." This Court finds that defendant has not conducted itself as a private club and therefore, does not qualify for the private club exemption.

Defendant also argues that any decision which forces it to open its doors to women will violate its members' constitutional right to choose with whom they will freely associate. This Court is not blind to the fact that persons of the same gender may wish to form an association for mutual enrichment, friendship and close ties. Such relationships should be protected from state intrusion. This type of constitutional argument was recognized in Roberts v United States Jaycees, 468 US 609,

104 S Ct 3244, 82 Ed 2d 462 (1984). It appears that the same factors which make a private club truly private also give rise to the types of relationships which the right of association insulates from governmental interference:

> Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Roberts, supra, 468 US 620. For the same reasons that this Court finds defendant not to be a private club this Court also finds defendant not to be the type of organization protected by the right of association. Defendant simply is neither small nor selective. Defendant lacks the distinctive characteristics that might afford constitutional protection to its decision to exclude women members.

Finally, at oral argument defendant argued that by requiring it to admit women to membership, this Court will discourage the Elks and other men's organizations from pursuing charitable activities. This Court finds it hard to believe that the prospect of having to admit women would cause the defendant to abandon its primary objective of "charity in its broadest significance." Opening the doors to female membership in the Lions and Jaycees has not sounded the death knell for these charitable organizations. Furthermore, nothing in this Opinion should be construed to mean that private male-only associations lose their privilege to exclude women when they do charitable works. Rather, that privilege is lost when the club abandons its priva[illegible]cacteristics of smallness and

selectivity of membership.

For the foregoing reasons this Court finds that the decision of the Rochester Elks to reject plaintiff's application violates the Elliot-Larsen Civil Rights Act. Defendant is ordered to reconsider plaintiff's application without consideration of gender. The issue of costs and attorney fees is reserved for later decision.

HILDA R. GAGE
CIRCUIT JUDGE

HILDA R. GAGE
Circuit Court Judge

Dated: November 15, 1989